

CHAPTER 18
LAWYERS

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18.1. LAWYER-GUARDIAN AD LITEM FOR THE CHILD

18.1.1. *Lawyer-Guardian ad litem for the Child*

The court is required to appoint a lawyer-guardian ad litem for the child at every hearing, including the preliminary hearing.¹ The child may not waive the assistance of an attorney.² The court is authorized to make temporary orders for the protection of the child pending the appearance of counsel or pending the completion of the preliminary hearing.³

18.1.2. *Duties of the Lawyer-GAL*

The lawyer-guardian ad litem is charged with representing the best interests of the child as determined by the lawyer. The role is intended to be aggressive and ambitious. The statute provides:

Sec. 17d. (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

- (a) The obligations of the attorney-client privilege.
- (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
- (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all

¹. MCL 722.630; MCL 712A.17c(7); MCR 3.915(B)(2) and MCR 3.965(B)(2). The court rules have not been changed to reflect the statutory amendments and still refer to the "child's attorney."

². MCL 712A.17c(7)

³. MCR 3.965(B)(2)

aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.

- (d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:
 - (i) Before the pretrial hearing.
 - (ii) Before the initial disposition, if held more than 91 days after the petition has been authorized.
 - (iii) Before a dispositional review hearing.
 - (iv) Before a permanency planning hearing.
 - (v) Before a post-termination review hearing.
 - (vi) At least once during the pendency of a supplemental petition.
 - (vii) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.
- (e) The court may allow alternative means of contact with the child if good cause is shown on the record.
- (f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.
- (g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.
- (h) To attend all hearings and substitute representation for the child only with court approval.
- (i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.
- (j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the

- family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.
- (k) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.
 - (l) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.⁴

18.1.3. *Conflict in Goals Between Lawyer-GAL and Child; Concurrent Appointment of Child's Attorney*

The statute provides for a circumstance in which the lawyer-GAL's view of what is in the best interests may differ from that of the child. Especially in the case of the older child, such conflicts are to be taken seriously. Consistent with the attorney-client privilege, which applies to the lawyer-GAL, the lawyer-GAL is to communicate the child's wishes to the court. Depending on the age and maturity of the child and the nature of the conflict between the lawyer-GAL and the child, the court may appoint a separate lawyer to represent the wishes of the child.

- (2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.⁵

18.1.4. *Duties of Child's Attorney*

The Juvenile Code defines "attorney" for these purposes:

"Attorney" means, if appointed to represent a child in a proceeding under section 2(b) or (c) of this chapter, an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this

⁴. MCL 712A.17d

⁵. MCL 712A.17d(2)

subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client.⁶

18.1.5. *Lawyer-GAL is not to Testify*

(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable.⁷

18.1.6. *Pay the Child's Lawyer*

The court rules require payment to the attorney for the child, a rule that is extended to the lawyer-guardian ad litem.

When an attorney is appointed for a party under this rule, the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party, which order may be enforced as provided by law.⁸

18.1.7. *Immunity for Guardians ad litem*

In 1996 the legislature amended the governmental immunity statute by adding the following:

A guardian ad litem is immune from civil liability for injuries to persons or damages to property whenever he or she is acting within the scope of his or her authority as guardian ad litem.⁹

This act predates the "lawyer-guardian ad litem" provisions discussed above. The immunity clearly extends to a person appointed as "guardian ad litem." Does the immunity also extend to "lawyer-guardian ad litem"? Legislative history would lead one to conclude that it does. The GAL immunity provision was added by the Legislature in response to a Court of Appeals ruling. In 1995, in *Bullock v. Huster*, the Court of Appeals affirmed the finding of a Circuit Court that a lawyer serving as guardian ad litem in a child custody dispute was *not* immune from liability for her actions as guardian ad litem for the child.¹⁰ One week after the effectiveness date of the amendment quoted above, on May 7, 1996, the Michigan Supreme Court entered an order, which says in part:

⁶. MCL 712A.13a(1)(c)

⁷. MCL 712A.17d(3)

⁸. MCR 3.915(E); **MCR 3.916(D)**

⁹. MCL 691.1407(6)

¹⁰. *Bullock v. Huster*, 209 Mich.App. 551 (1995)

[I]n lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of the amendment of MCL 691.1407... 1996 PA 143.¹¹

“Lawyer-guardian ad litem” is a new term adopted by the legislature to distinguish between the duties of a lawyer and non-lawyer GAL. At heart, however, both lawyer and non-lawyer GAL are charged with representing the child’s best interests. On the other hand, the lawyer-GAL statute says explicitly that the lawyer-GAL’s duty is to the child and not to the court.¹² What difference all this will make is uncertain pending an authoritative interpretation from the appellate courts.

Also related to the question of GAL immunity is the finding in *Kurzawa* that a GAL sued under 42 USC 1983 would be entitled to absolute immunity.¹³

Baldwin, who functioned as guardian ad litem for Cass Kurzawa, must act in the best interests of the child he represents. Such a position clearly places him squarely within the judicial process to accomplish that goal. A guardian ad litem must also be able to function without the worry of possible later harassment and intimidation from dissatisfied parents. A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate for the child in judicial proceedings.

The question remains whether the protections enjoyed by “guardians ad litem” will also be extended to “lawyer-guardians ad litem”?

18.2. NONLAWYER GUARDIAN AD LITEM

The court may also appoint a guardian ad litem for the child who need not be a lawyer.

To assist the court in determining a child’s best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under this chapter.¹⁴

The court rules permit the court to appoint a guardian ad litem for any party "if the court finds that the welfare of the party requires it."¹⁵ There is no requirement that the guardian ad litem be an attorney. The GAL must file a written appearance with the court disclosing the existence of any interest that the GAL

¹¹. 451 Mich. 884 (On remand at 218 Mich.App. 400, the Court of Appeals granted summary disposition for the defendant for any damages claimed while she was acting within the scope of her authority as guardian in light of amendment of MCL 691.1407.

¹². MCL 712A.17d(1)

¹³. *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (CA 6, 1984)

¹⁴. MCL 712A.17c(10)

¹⁵. MCR 3.916

holds in relation to the child, the family, or any other person in the proceeding.¹⁶ The GAL is entitled to be furnished copies of all petitions, motions, and orders filed or entered, and to consult with the attorney of the party for whom the guardian ad litem has been appointed.¹⁷ The court may assess costs of providing a GAL against the party or a person responsible for the support of the party, and may enforce the order of reimbursement through contempt proceedings.¹⁸

18.3. COURT APPOINTED SPECIAL ADVOCATES

Many Michigan counties have Court Appointed Special Advocate Programs (CASAs) in which trained and supervised lay volunteers are appointed, along with an attorney for the child, to represent the interests of the child.¹⁹ The CASA may be appointed guardian ad litem under MCL 712A.17c(10) and MCR 3.916.

18.4. ATTORNEY FOR THE RESPONDENTS

18.4.1. *Right to Counsel*

Respondents are entitled to retain counsel. If they are indigent, the court will appoint counsel on their behalf. An attorney appointed by the court serves until discharged by the court.²⁰ At the respondent's first court appearance the court is required to advise them of the right to an attorney at each stage of the proceeding and the right to a court-appointed attorney if the respondent is financially unable to employ an attorney.²¹ If the respondent is not represented by an attorney, the court must advise them of their right to request and receive a court-appointed attorney at any later proceeding.²²

18.4.2. *Counsel for Respondents at Preliminary Hearing*

If a parent requests assistance of an attorney at preliminary hearing may the court proceed with the complete preliminary hearing in the absence of counsel for the parent or should the court adjourn the hearing for appearance of parent's counsel? Practice in Michigan courts seems to vary with the great majority of courts either providing counsel at all preliminary hearings or adjourning the preliminary until counsel can appear. Some few counties, however, complete the business of the

¹⁶. MCR 3.916(B)

¹⁷. MCR 3.916(C)

¹⁸. MCR 3.916(D)

¹⁹. Contact Michigan CASA Association at Children's Charter of the Courts, 324 N. Pine, Lansing, MI 48933. Phone at 517 482-7533; fax at 517.482.2626. *See also* MCR 3.917

²⁰. MCL 712A.17c(9); MCR 3.915(D)

²¹. MCL 712A.17c(4); MCR 3.915(B)(1); Failure to advise respondent of the right to court appointed counsel at the first hearing will result in a reversal of the court's orders. *See In re Keifer*, 159 Mich.App. 288 (1987)

²². *Id.*

preliminary hearing even when a parent asks for appointment of counsel. The statute and rules are not perfectly clear on this point. The statute seems to be internally inconsistent in that it says that the respondent is to be advised of the "right to an attorney *at each stage* of the proceedings," and, "if the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney *at a later proceeding*."²³ The court rule says if the respondent is not represented by an attorney, "the respondent may request and receive a court-appointed attorney *at any later hearing*."²⁴(emphasis added)

The intent of the statute seems to be to provide parents with counsel at every stage. At the preliminary hearing significant legal rights are at stake. For instance, the respondent is asked to deny or admit the allegations and to make a statement of explanation.²⁵ Without counsel, the respondent may not fully understand the allegations or the consequences of an admission or denial or any statement of explanation. An admission at preliminary hearing is the first step toward a possible termination of parental rights where the right to counsel is constitutionally required.²⁶ Many believe that preliminary hearing is one of the most critical steps in the child protection legal process. Considering the importance of preliminary hearing, it seems that the better practice for courts, upon a request from a respondent for appointment of counsel, would be to adjourn the hearing for appearance of counsel, making whatever temporary orders may be necessary for the protection of the child.

18.4.3. *Waiver of Right to Attorney*

A respondent may waive the right to an attorney except that a respondent who is a minor may not waive the right to any attorney if the respondent's parent or guardian ad litem objects.²⁷ The court rules require an affirmative action of the part of the respondent parents to trigger the appointment and continuation of appointed counsel in all hearings that may affect their parental rights. In *Hall*, there was no error when the court conducted statutory review hearings without respondent's counsel being present where respondent had effectively terminated the attorney-client relationship.²⁸

²³ MCL 712A.17c(4)(a)&(c)

²⁴ MCR 3.915(B)(1)(a)(ii)

²⁵ MCR 3.965(B)(7)

²⁶ *Reist v. Bay Circuit Judge*, 396 Mich. 326 (1976)

²⁷ MCR 3.915(B)(1)(c)

²⁸ *In re Hall*, 188 Mich.App. 217 (1991)

18.4.4. *Direct Lawyer Contact with the DHS Worker*

Generally attorneys are prohibited from talking about a case with persons who are represented by counsel, unless the attorney has the consent of the other lawyer or is authorized by law to have the communication.²⁹ A State Bar of Michigan ethics panel concluded that lawyers representing parents may have direct contact with the DHS worker even without the consent of their attorney.³⁰ The ethics opinion found that such communications are clearly authorized by law for the lawyer-guardian ad litem for the child (MCL 712A.17d(1)(c)). As to parent's attorneys, such communication were in a sense authorized by law since the parents are party to a controversy with a government agency and have a right to talk with government officials about the matter. Further, to properly represent a client, the lawyer for the parent or child needed to have contact with the caseworker in order to prepare for trial and to assist the client to understand and comply with DHS or court requirements. "Requiring the lawyer for parents or children in child protective proceedings to obtain the consent of the DHS attorney before contacting the worker would involve the DHS attorney in the day to day case management activities of the caseworker."³¹

Nonetheless, this ethics opinion does not limit the DHS ability to proceed with extra care in certain cases. Under certain tense circumstances, the DHS could choose or counsel for DHS could advise, that the DHS not communicate with a certain attorney or in a certain case without consultation with or the presence of counsel.

18.5. COUNSEL FOR PETITIONER

Upon request of the court, the prosecuting attorney is obliged to review the petition for legal sufficiency and shall appear at any Child Protective Proceeding.³² Upon request of the Department or an agent of the Department, the prosecuting attorney shall serve as a legal consultant to the Department or the Department's agent in protection proceedings.³³ The scope of the prosecutor's duties as "legal consultant" is not clear from the statute or rules.³⁴ The Department or its agent is

²⁹. Michigan Rules of Professional Conduct (MRPC) 4.2

³⁰. Ethics Opinion RI-316, State Bar of Michigan, December 13, 1999

³¹. *Id.*

³². MCR 3.914(A)

³³. MCL 712A.17(5); MCR 3.914(C)(1)

³⁴. Webster's New Collegiate Dictionary defines "consultant" as "one who gives professional advice or services" (emphasis added). The Michigan Rules of Professional Conduct prohibit a lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." MRPC 5.5(b)

authorized to contract with an attorney of its choice for legal representation if the prosecuting attorney does not appear on behalf of the Department or its agent.³⁵ The statute seems to anticipate that the prosecutor, when he or she appears, would appear "on behalf of the department," that is as civil counsel, analogous to the prosecutor's corporation counsel relationship to a county when appearing in civil suits. The civil lawyer-client relationship between the Department and the prosecutor (or other counsel) in child protection cases is in contrast to the role played by the prosecutor in criminal matters when the office appears on behalf of the people and in that role determines the goals of the litigation. The distinction between a civil or criminal role of the prosecutor becomes very important in determining whether the Department or the prosecutor identifies the goals of the litigation. The expectation in civil child protection cases is for the Department to determine the goals of the litigation, as would any other civil client.

In Wayne County the Attorney General represents the DHS in child protection cases and there is generally no ambiguity as to their role as representatives of the DHS interests. In certain other counties, the Department of Human Services has developed contracts with the county prosecutor's offices in which the role of the prosecutor as representative of the agency is set out by contract and the DHS provides funds for the legal services.

18.6. ATTORNEY GRIEVANCE COMMISSION

Occasionally one may believe that attorneys representing one party or another have failed to fulfill their duty as required by law. The Supreme Court and State Bar of Michigan take the responsibility to police attorney behavior very seriously and provide clear avenues for receiving and acting on grievances. The Michigan Attorney Grievance Commission and Attorney Discipline Board is provided for in Michigan Court Rules 9.101, et seq. The Attorney Grievance Commission is described in MCR 9.108 as the "prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan Attorneys." The Commission has authority to investigate, and when necessary, prosecute charges of attorney misconduct. The Commission's office is located at 243 West Congress, Suite 256, Marquette Building, Detroit, Michigan 48226-3259. Phone No.: 313-961-6585. FAX: 313-961-5819. Its web site address is <http://www.agcmi.com>.

The Commission's full-time staff consists of fourteen attorneys include the grievance administrator and twenty support personnel. The Commission also maintains a roster of 180 volunteer attorneys throughout the State whose services are used as the need arises. One may obtain grievance forms from the commission or download them from the website. A request for investigation must be reduced to written form, describe the alleged misconduct, be signed by the complainant and be filed with the grievance administrator. Anyone can file a request for investigation including clients, judges, opposing counsel and even the

³⁵. MCL 712A.17(5); MCR 3.914(C)(2)

opposing party.

18.7. JUDICIAL TENURE COMMISSION

The Judicial Tenure Commission is established by the Michigan Supreme Court through Michigan Court Rule 9.201 et seq. The Judicial Tenure Commission will act on complaints against a judge that allege specific charges of misconduct in office, or mental or physical disability. One can contact the Judicial Tenure Commission at its offices at 3034 W. Grand Blvd, 8th Floor, Suite 450, Detroit, Michigan 48202. Phone No.: 313-875-5110. FAX: 313-875-5154. Its web site address is <http://jtc.courts.mi.gov/>.